STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2011
v	No. 289504 Wayne Circuit Court
MARK NACNASHA CARTER, Defendant-Appellant.	LC No. 08-002655-01-FH

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of breaking and entering a building with intent to commit larceny. MCL 750.110. The trial court sentenced defendant to one to ten years' imprisonment. At the time of trial, defendant elected to proceed in propria persona. However, appointed counsel was present during the trial to assist defendant if needed. After his conviction, defendant was appointed appellate counsel. Appellate counsel has raised one issue on defendant's behalf. Pursuant to Supreme Court Administrative Order 2004-4, defendant has also filed a Standard 4 brief wherein he has raised several additional issues on appeal. Because we find no error requiring reversal in any of the issues raised by defendant, or on his behalf by appellate counsel, we affirm the conviction and sentence. However, because there are some factual errors in defendant's presentence investigation report (PSIR), we remand for the limited ministerial task of correcting the PSIR.

Defendant first argues, through appellate counsel, that the prosecutor's statements during closing arguments deprived him of his Fifth Amendment right not to testify. We find no merit in defendant's claim. As indicated, defendant elected to represent himself during the course of the trial and specifically chose not to testify. However, on several occasions throughout the course of the trial, defendant made blatant statements of "fact." Nearly every time, the prosecutor objected to defendant's attempts to give "unsworn testimony." This prompted the court to caution defendant about his conduct. At the time of closing arguments, defendant interrupted the prosecutor at least three times interjecting "factual statements." Eventually, the prosecutor made the following statement to which defendant now takes issue:

> The other strange thing about this case is that the Defendant here is representing himself so he gets up and he says a lot of things. He's never sat up

there and testified, taken an oath to tell the truth and that's not to be held against him, ladies and gentlemen.

He has the right to stay quiet, but don't assume that what he says from that microphone or what he tells you is the truth, because that is only questions that he can ask. That is not testimony. That is not the truth. He had the right and he chose not to, to get up there and testify.

Defendant did not object to the prosecutor's statements. We review an unpreserved claim of constitutional error under the plain-error standard. *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

It is axiomatic that neither a prosecutor nor a trial court may comment upon a defendant's decision to exercise his or her constitutional right not to testify. However, when a defendant elects to proceed in propria persona, the application of this axiom must be more fully explored. This Court did just that in *People v Kevorkian*, 248 Mich App 373; 639 NW2d 291 (2001). In *Kevorkian*, the defendant did not testify but gave his own closing argument to the jury during which he interjected what was described by this Court as "first-person testimony." *Id*. at 429. The prosecutor repeatedly objected, claiming that the defendant "can't testify now" and that he could have testified, but did not. *Id.* at 430. This Court concluded:

> Defendant's decision to testify to the jury during closing arguments rather than commenting on the evidence admitted at trial prompted the prosecutor's response. Defendant's comments can only be characterized as repeated and improper attempts to present the jury with facts not in evidence. The prosecutor's comments were properly focused on preventing defendant from continuing down this wrong path. . . . To defendant's benefit, the trial court also instructed the jury that every defendant has an absolute right not to testify, that the jurors must not consider the fact that defendant did not testify, and that this fact must not affect their verdict in any way. In sum, given the circumstances of this case, we conclude that defendant has failed to demonstrate a plain error requiring reversal. [*Id.* at 438.]

Applying the *Kevorkian* rationale, we conclude that the prosecutor's statements in the present case were simply a response to defendant's repeated improper attempts to inject facts not in evidence and a reminder to the jury that statements made by defendant while examining the witnesses and at the time of closing arguments were not evidence. We recognize that the prosecutor did specifically state that defendant had the right to testify, but chose not to. However, the prosecutor's statements must be taken in context and read as a whole. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). While the prosecutor did make this statement, he also explained that defendant's failure to testify could not be held against him. In this case, it was not defendant's silence that the prosecutor was commenting upon, but rather, defendant's repeated attempts to improperly inject facts not in evidence. In any event, any prejudicial effect resulting from the prosecutor's comments would have been eliminated by the trial court's instructions. At the conclusion of the closing arguments, the court specifically instructed the jury that defendant had the right to remain silent and that a failure to testify could

not be held against him. Indeed, the court instructed the jury in this manner on at least three other occasions. Thus, defendant has failed to demonstrate a plain error requiring reversal.

The remaining claims of error that we will address were all raised by defendant in his Standard 4 brief. Under the guise of claiming ineffective assistance of counsel, defendant first argues that the trial court erred when it failed to grant his request for substitution of appointed counsel during the preliminary examination. A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Addressing the substitution of counsel, this Court has explained:

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*Id.* (citations omitted).]

Our review of the record fails to demonstrate that good cause existed to warrant substitution of counsel. Instead, it would appear that defendant simply did not understand or appreciate the frankness with which counsel informed him of the alleged evidence against him. Moreover, it also appears that appointing substitute counsel at the time of defendant's request would have disrupted the judicial process.

Next, defendant argues that he was denied the effective assistance of counsel during the course of the preliminary examination. In particular, defendant claims that his counsel failed to object to leading questions and failed to establish a record concerning defendant's defense, i.e., that the complainant was not the legal owner of the property. In order to demonstrate that he was denied the effective assistance of counsel, defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To demonstrate prejudice, defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 600.

In this case, defendant has failed to cite to any instances in the record in which his counsel failed to object to leading questions. Moreover, defendant does not identify the evidence that, if offered, would have supported defendant's articulated defense. "A defendant many not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Defendant has not demonstrated how his counsel's representation was deficient, let alone, how the result of the proceeding would have been different but for counsel's alleged errors.

Next, defendant argues that the admission of the complainant's preliminary examination testimony violated the Confrontation Clause of the Sixth Amendment because the witness's unavailability was questionable and defendant was not given adequate opportunity to cross-examine the witness at the preliminary examination. Defendant also argues that the Confrontation Clause was violated when he was deprived the opportunity to call additional

witnesses at the preliminary examination. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the "right . . . to be confronted with the witnesses against him" and excludes the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and defendant had a prior opportunity for cross-examination." *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Prior testimony at a preliminary examination constitutes a testimonial statement. *Id.* at 68.

At the time of trial, the court permitted the admission of the complainant's preliminary examination testimony after finding that the witness was unavailable. Despite defendant's irrational belief that the complainant was faking a closed head injury, there was overwhelming evidence presented to the trial court that he was in a semi-comatose state that rendered him unable to communicate. Furthermore, defendant had an opportunity to cross-examine the complainant at the preliminary examination. Thus, it would appear at first blush that the court's admission of the prior testimony at the time of trial did not constitute a violation of the Confrontation Clause.

Defendant, however, contends that the Confrontation Clause was further violated when the court limited the scope of his cross-examination at the preliminary examination. The Confrontation Clause only guarantees defendant an opportunity for effective cross examination. It does not guarantee "'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999), overruled in part on other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006), quoting *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988). Defendant's claim that he was not provided an opportunity to effectively cross-examine the witness is not supported by a review of the transcripts. Defendant's counsel cross-examined the complainant on several facets of the alleged crime. Because defense counsel had an adequate opportunity to cross-examine the complainant, defendant's right of confrontation was not violated when the trial court later admitted this preliminary examination testimony at the time of trial.

Next, defendant argues that his right of confrontation was violated during the preliminary examination because he was deprived of the opportunity to call additional witnesses. At the conclusion of the complainant's testimony, the district court immediately started to issue its ruling. Defense counsel, however, objected and indicated that defendant wished to call his own witnesses, specifically, Officer Bryan Kondratko. Although the court clearly was not pleased to extend the proceedings, the court immediately re-opened proofs and permitted defendant to call the officer. At the conclusion of the examination, defendant did not indicate that there were any additional witnesses he wished to call. Then the court, albeit reluctantly, acknowledged that defendant had the right to call witnesses at the preliminary examination. Based upon this record, there is no support for the proposition that defendant was denied the opportunity to call witnesses on his behalf at the preliminary examination.

For his next claim of error, defendant challenges the sufficiency of the evidence. This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The Court is required to view the evidence in the light most favorable to the prosecution to determine whether the evidence presented by the prosecution was sufficient for a rational trier of fact to find that the elements of the criminal

offense were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

The elements of breaking and entering with the intent to commit larceny are (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein. MCL 750.110; *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). Any amount of force used to open a window or door, no matter how slight, is sufficient to constitute a breaking. *Id.* at 659. With respect to the element of intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant broke into and entered the building on Tyler Street in the City of Detroit with the intent to commit a larceny. The complainant testified that when he arrived at the property, he heard someone inside the building moving items. He also saw a pick-up parked around the corner of the building approximately 20 feet away. The large metal rolling door had been bent out away from the wall of the building. After calling the police, the complainant removed his hunting rifle from his vehicle and waited for defendant to leave the building. Approximately 15 minutes later, the complainant observed defendant exit the building. In doing so, defendant pushed out the door and squeezed through the gap created by the damaged door. The complainant testified that the only way defendant could have entered the building was in the same manner he exited it. The complainant held defendant at gun point until the police arrived. The complainant testified that while the door had been damaged a week earlier during another break-in, he had fixed the damage. The complainant visited the building almost every day. When he was there the day before, all the doors were locked. After the police arrived and secured defendant, the complainant went into the building and observed that many of the items in the building, including large tools, had been moved to create a pile near the door. The day before, the items were in various places in the building. The complainant also noticed his large construction ruler in the back of the pick-up truck, which the police officers later determined belonged to defendant. Based upon the forgoing, there was sufficient evidence that defendant broke into the building, entered the building and, at the time of the breaking and entering, he intended to commit a larceny.

Defendant next argues that his trial counsel's performance was deficient in that he refused to seek dismissal of the charges based on defendant's belief that the complainant did not own the property, but, as a result of a forfeiture, it actually belonged to Wayne County. Defendant seems to argue that if the complainant were not the legal owner, he lacked the capacity of being a "complainant." Defendant argues that because his counsel refused to pursue this avenue of defense, he was forced to represent himself at trial. Defendant has not demonstrated that he was denied the effective assistance of counsel.

As stated above, in order to establish ineffective assistance of counsel, defendant must show that but for counsel's error, the results of the proceeding would have been different. *Carbin*, 463 Mich at 600. Defendant cannot demonstrate that if his counsel would have filed a motion to dismiss based upon the grounds suggested, it would have been successful. The prosecution was not required to establish the legal owner of the building. Instead, the prosecution need only prove that defendant broke into a building, that he entered the building,

and that he intended to commit a larceny therein. Establishing ownership of the property is not an element of the offense of breaking and entering with the intent to commit larceny. In any event, before trial, the Information was amended to include Wayne County as a possible complainant.

Defendant also claims several acts of prosecutorial misconduct. We have reviewed the conduct of the prosecutor, and the record does not support a finding of misconduct. The prosecutor did not refer to facts not in evidence, but rather made reasonable inferences from the evidence presented. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences. *People Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant also argues that the prosecutor repeatedly referred to the complainant's advanced age. However, defendant has failed to cite from the record any instances of this alleged attempt to appeal to the jury's sympathies. A defendant may not simply state his position and then leave it to this Court to search for a factual basis for his claims of error. *Norman*, 184 Mich App at 260.

Next, defendant argues that the prosecutor lied to the court about the existence of a signed Information in the court file. Defendant argues that in the absence of a properly executed Information, all proceedings occurring after the filing of the defective Information are invalid. There is simply nothing in the record to substantiate this claim of prosecutorial misconduct.

Finally, defendant argues that the prosecutor committed misconduct when he allowed the "perjured" testimony of the complainant to be presented to the jury and when he failed to dismiss the charges when he became aware that the complainant did not own the property. Because defendant believed that Wayne County owned the property, he asserted that the complainant's testimony regarding his ownership was knowingly fabricated. At the onset, even accepting as true defendant's assertion that Wayne County owned the property, it does not appear that the complainant committed perjury. He testified that he was the owner of a "garage" located at 13714 Tyler. He also testified that he bought the "building" 22 years earlier. The complainant clearly believed that he owned the building as he, at one time, operated his business out of it, visited the location nearly every day, maintained the locks and doors on the building, and kept his hunting dogs, as well as other items related to his trucking business, on the premises. Moreover, it should be noted that the record is extremely vague, and far from conclusive, regarding the issue of ownership of the property. We are not persuaded that the prosecutor knowingly presented perjured testimony to the jury.

For his final claim of error, defendant submits that his PSIR contains several inaccuracies. We agree in part. At the time of sentencing, defendant took issue with the criminal history in his PSIR. Although the PSIR indicated that he was previously convicted of receiving and concealing stolen property with a value greater than $20,000, defendant claimed that his conviction was actually for receiving and concealing stolen property with a value greater than $1,000 but less than $20,000. Defendant also claimed that this inaccuracy was repeated elsewhere in the PSIR. The trial court agreed that there was an error in this regard. Defendant also argued that a resisting and obstructing conviction appearing in his PSIR was actually a charge that had been dismissed. In his Standard 4 brief, defendant again raises these alleged

inaccuracies. In addition, for the first time, defendant argues that the PSIR inaccurately reflects that he was convicted of delivery or manufacturing 50 grams of cocaine. Defendant represents that he was actually convicted of mere possession of cocaine.

An amended judgment of sentence contained in the lower court file reflects that defendant was convicted of receiving and concealing stolen property with a value greater than $1,000 but less than $20,000. In addition, the lower court record contains a stipulation signed by the prosecutor and defendant's appellate counsel providing for the deletion of statements in the PSIR regarding this conviction. It appears that the corresponding order was never entered by the court. The PSIR should accurately reflect defendant's prior convictions. "It is important that a PSIR be accurate because it follows the defendant to the Department of Corrections and serves as a basis for decisions about parole and how the defendant will be classified in the system." *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985). Therefore, the PSIR should be changed to reflect defendant's conviction of receiving and concealing stolen property with a value greater than $1,000 but less than $20,000. Defendant's other claims of inaccuracies in the PSIR do not appear to be supported by the record. Furthermore, it should be noted that there is no evidence offered or argument made that the sentencing guidelines would be affected by the corrections to the PSIR; thus, resentencing is not required. Rather, the remedy is to remand for the limited purpose of correcting the PSIR.

Affirmed, but remanded for the trial court to complete the administrative task of correcting defendant's PSIR. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering